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ALEXANDER L. STEVAS,
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No. 80-1773

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

MYRON J. AUFIERO,
Petitioner,

v.

OWEN L. CLARKE
and
MICHAEL S. DUKAKIS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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ARGUMENT

Petitioner Myron J. Aufiero (Aufiero) asserts that special and important reasons warrant review on writ of certiorari of the decision of the United States Court of Appeals for the First Circuit in Aufiero v. Clarke, 639 F. 2d 49 (1st Cir. 1981). Aufiero perceives three significant issues in the First Circuit's decision: (1) whether a public employee may claim First Amendment protection for his own patronage activity; (2) whether this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976), should be applied retroactively to Aufiero's demotion in July, 1975; and (3) whether Aufiero had stated any claim for relief under such preceding decisions as Perry v. Sinderman, 408 U.S. 593 (1972), and Keyishian v. Board of Regents, 385 U.S. 589 (1967).

The Court should deny Aufiero's petition for writ of certiorari because the First Circuit's decision rests exclusively upon its holding that Elrod v. Burns does not warrant retroactive application under the principles established in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The only other Court of Appeals which has ruled on this issue reached the same conclusion. Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979). With one exception, the District Courts have followed suit. Aufiero, 639 F. 2d at 52 n. 2. See also Farkas v. Thornburgh, 493 F. Supp. 1168, 1178 n. 23 (E.D. Pa. 1980) (suggesting that the related rule of Branti v. Finkel, 445 U.S. 507 (1980), should not be applied retroactively). By its denial of the petition for writ of certiorari in Ramey v. Harber, this Court has already confirmed that the

retroactivity of Elrod v. Burns does not constitute "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. Rule 17.1(c). Moreover, this issue has lost any practical significance because the applicable statutes of limitation have presumably run upon the prosecution pursuant to 42 U.S.C. §1983 of claims which would apply the rule of Elrod v. Burns to events predating that decision. See, e.g., Kadar Corp. v. Milbury, 549 F. 2d 230 (1st Cir. 1977) (actions pursuant to 42 U.S.C. §1983 are governed by the Massachusetts statute of limitations for torts). Even if this Court were to rule that Elrod v. Burns should be applied retroactively, these statutes of limitation would independently bar the prosecution of claims predating the Elrod opinion.

This Court should not review the substantive constitutional issues advanced by Aufiero because the First Circuit did not squarely decide those issues. The First Circuit declined to determine the scope of First Amendment protection for patronage activity. 639 F. 2d at 51. With respect to the possible significance of Perry v. Sinderman and Keyishian v. Board of Regents, the First Circuit noted that "plaintiff's case below was based entirely on Elrod, despite the early assertion of a non-retroactivity defense." 639 F. 2d at 52. By his omission, Aufiero was thus deemed to have waived any claim under Perry v. Sinderman and Keyishian v. Board of Regents. In the absence of any decision, rather than dicta, on these substantive issues, Sup. Ct. Rule 17.1(c) does not support the issuance of a writ of certiorari.

CONCLUSION

For the reasons set forth above, the Court should deny Aufiero's petition for a writ of certiorari to review the First Circuit's decision.

Respectfully submitted,

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